

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 70 OF 2017

MASTS CONSTRUCTION COMPANY LIMITED.....
PLAINTIFF/APPLICANT

-VERSUS-

WAVETECH EZCO LIMITED1ST DEFENDANT/1ST
RESPONDENT

THE COUNTY

GOVERNMENT OF NAIROBI.....2ND DEFENDANT/2ND
RESPONDENT

RULING

1. This is a Ruling in respect to the Plaintiff/Applicant's Application dated 26th March, 2024 for reinstatement of a dismissed suit for want of prosecution.

Background Facts

2. The Applicant filed the Notice of Motion dated 26th March 2024 seeking the following orders;

- a) *The Court to set aside its orders made on 26/05/2021 dismissing the Plaintiff/Applicant's suit for want of prosecution and all other consequential orders thereto.*
 - b) *The suit be reinstated.*
 - c) *Costs of the Application be in the cause.*
3. This Application was supported by the Affidavit of **Hatangimana Modeste**, who averred that the suit was filed on 16th February 2017. That upon hearing the parties, the Court ordered the 2nd Defendant to deposit Kshs. 4,212,004/= with the 1st Defendant's Advocates to be held in escrow. That upon compliance, the 2nd Defendant would be discharged from the proceedings without prejudice to its right to claim costs.
4. Further, the Applicant explained that in default, the 1st Defendant was at liberty to execute against the 2nd Defendant's assets. Following non-compliance, the 1st Defendant initiated execution proceedings, including issuing a 15-day notice through auctioneers. An application by the 2nd Defendant seeking to restrain execution was certified urgent but ultimately dismissed on 29th September 2017.

5. Subsequently, the Plaintiff became dissatisfied with his former advocates for failing to act and instructed new Counsel. Upon the new Counsel's perusal of the Court file, he discovered that the suit had been dismissed on 26th May 2021 for want of prosecution without the Plaintiff's knowledge. The Plaintiff pleads that the dismissal was solely due to his former advocate's inaction and should not be visited upon it, emphasizing its continued interest in prosecuting the matter and executing the judgment. It argues that it stands to suffer prejudice if the suit is not reinstated. It urges the Court to allow the application in the interest of justice and fairness.
6. Despite service by the Applicant, there was no response filed by the Respondents.

Issues for determination

7. The Court has carefully considered the Application and the submissions by the Applicant, and frames only one issue for determination.

a) Whether the Court should set aside its orders made on 26th May 2021 dismissing the Plaintiff/Applicant's suit; and have the suit reinstated.

Analysis

8. **Order 17 rule 2 of the Civil Procedure Rules** is clear that where no step is taken by either party for a period of 1 year, the suit then is ripe for dismissal. Reinstatement of a suit is discretionary. **Section 3A of the Civil Procedure Act** gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. In exercising the discretion, the Court is called upon to act judiciously and not whimsically or capriciously.
9. It was the Applicant's case that the suit was dismissed on 26th May 2021 without his knowledge, while he was represented by his former Advocates, **M/s MWANIKI GITAU & COMPANY ADVOCATES**. Upon instructing new Counsel, **M/s ACHACH & ASSOCIATES ADVOCATES LLP**, on 20th February 2024, they promptly filed a Notice of Change of

Advocates. Upon seeking to peruse the Court file, they discovered that the matter had already been dismissed, for want of prosecution. This prompted the filing of the present application seeking reinstatement of the suit to enable execution and determination of the issues in dispute.

10. Further, in submission, the Applicant maintained that it has always been keen on prosecuting the suit and that justice can only be achieved if the dismissal orders are set aside. It further relied on Article 159(2)(d) of the Constitution of Kenya, which mandates Courts to administer justice without undue regard to procedural technicalities. Thus, it urged the Court to reinstate the suit to allow substantive justice to prevail.

11. In **Mwangi S. Kimenyi Vs. Attorney General & Another [2014] eKLR**, the Court outlined the test to be considered in a case for reinstatement of suit. It was stated that: -

“The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. See the case of

IVITA Vs KYUMBU [1984] KLR 441, Chesoni J. (as he then was) that: -

‘The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too.

The defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

12. Delay – the suit was dismissed for want of prosecution on 26th May 2021, the Application herein was filed on 26th March 2024 three years after the dismissal of the suit. The reasons for the delay advanced by the Applicant were that the dismissal was solely due to his former advocate’s inaction and should not be visited upon him.

13. The Court of Appeal in **B1-Mach Engineers Ltd- Vs- James Kahoro Mwangi (2011) eKLR** where while commenting on the duty of a client *vis-à-vis* counsel, observed as follows:-

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erst while advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty for the client to pursue his matter. If the client was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”

14. In the instant case, the Applicant has pleaded that he constantly pushed Counsel for updates in the matter but none were forth coming. The Court is not presented with any evidence of this constant prodding by the Client to the Advocate for information. There are no screenshots of **sms** or *Whatsapp* messages. There are no emails to the Advocates that remain unanswered. This does not present a tidy picture to the Court. It may be that the Client made calls

to the Advocate or visited the office personally, the Court would expect a disclosure of when the calls or office visits were made. As matters now stand it is just allegations by the Client of inaction on the part of its former Counsel. The Court nevertheless has to maintain a 360-degree view on the case while exercising its discretion. The Court notes that the Application is not opposed. That earns the Applicant some saving grace.

15. In light of the above the Court is persuaded to exercise its discretion in favour of the Applicant.
16. As to costs, the same are awarded at the discretion of this Court. It is only fair that there be no orders as to costs. The Applicant ought not to be seen to profit from acts of tardiness.

Determination

17. The Plaintiff/ Applicant's Application by way of a Notice of Motion dated 26th March 2024 is allowed in the following terms;
 - (a) *The Court HEREBY sets aside its orders made on 26/05/2021 dismissing the Plaintiff/Applicant's suit*

for want of prosecution and all other consequential orders thereto.

(b) The suit be and is HEREBY reinstated.

(c) There be no orders as to costs.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 13TH DAY OF APRIL, 2026.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Kwarikwar holding brief for Mr. Achach for the Plaintiff/Applicant

N/A for the 1st Defendant/Respondent

N/A for the 2nd Defendant/Respondent

Mr. John Paul - Court Assistant